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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 877

IN THE MATTERS

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,

Debtors.

A. PHILIP WOOLFSON,

Petitioner,

v.

LESTER T. DOYLE, As Trustee in Reorganization, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner,

against

LESTER T. DOYLE, as Trustee in Reorganization, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 10, 1959. The judgment of the Court of Appeals granted a motion by the Securities and Exchange Commission to dismiss the appeal of petitioner herein to review the

order of the United States District Court for the Southern District of New York entered December 23, 1958, denying petitioner's motions (a) to vacate the order directing consummation of the Joint Plan of Reorganization and reopening the proceedings, or, in the alternative, to modify the order confirming the Joint Plan of Reorganization; (b) to vacate the order awarding final allowances; and (c) to compel the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange.

Opinions Below

The judgment of the Court of Appeals was entered on April 10, 1959, as follows: "Especially in view of our opinion in 238 F. 2d 665 and Judge DIMOCK's careful memorandum-decision and opinion of November 28, 1958, we find the grounds of appeal now advanced utterly lacking in merit. The within motion is granted and the appeal is hereby dismissed as frivolous." The District Court's opinion is abstracted in the Appendix to appellant's brief filed in the Court of Appeals, pages 56a to 64a. No opinion of the Court of Appeals was rendered in dismissing petitioner's appeal.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1); and the general supervisory powers of this Court over lower Federal courts.

Questions Presented

1. Whether there was an abuse of judicial discretion by the Court of Appeals in dismissing petitioner's appeal as frivolous.

2. Whether subsequently discovered evidence of fraud should have been disregarded by the Court of Appeals without a hearing on the merits.

3. Whether a court of equity can deprive petitioner of a hearing on the obligation and duty of the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange for wilful violation of S.E.C. regulations.

4. Whether an order of strict insolvency of a debtor in Chapter X proceedings is valid when notice of such bar order is deliberately not given to the stockholders by the reorganization trustee or his counsel.

5. Whether the Congress intended to give the Federal courts jurisdiction over the reorganization of intrastate public utilities under Chapter X of the Bankruptcy Act absent State regulatory jurisdiction over such utilities.

Statement of the Case

On September 30, 1958 the District Court held a hearing on two motions filed by petitioner pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for orders, (1) vacating the Court's order of December 17, 1956 consummating the plan of reorganization of debtor and reopening the reorganization of debtor, or in the alternative, for an order modifying the order confirming the plan of reorganization of debtor dated October 8, 1956 so as to permit petitioner to institute an action for damages against the reorganization trustee, and (2) vacating the Court's order of July 1958 awarding final allowances in the reorganization proceedings. (See Appendix to Appellant's Brief, pages 10a-38a.) On November 28, 1958 the Court entered a memorandum opinion denying the said two motions. (See Appendix to Appellant's Brief, pages 56a-64a.) On November 5, 1958 petitioner filed a motion seeking an order pursuant to Rule 81(b) of the Federal Rules of Civil Procedure to compel the Securities and Exchange Commission to institute criminal proceedings against the New York

Stock Exchange for wilful violation of the S. E. C. Regulations. No hearing was held on this motion and the Court on November 28, 1958 entered a memorandum opinion denying the motion. (See Appendix to Appellant's Brief, page 55a.) On December 23, 1958 the Court entered an order denying the said three motions. (See Appendix to Appellant's Brief, pages 65a-66a.) On December 26, 1958 petitioner filed a notice of appeal from the order of the Court dated December 23, 1958. (See Appendix to Appellant's Brief, page 67a.) On February 9, 1959 petitioner filed his brief and appendix in the Court of Appeals on the appeal from the said Court's order of December 23, 1958. On or about March 3, 1959 counsel for the reorganization trustee filed a brief on behalf of the reorganization trustee as appellee. On March 19, 1959 petitioner filed his Reply Brief to Appellee's Brief in the Court of Appeals. On April 1, 1959 petitioner was served with a Notice of Motion by the Securities and Exchange Commission to dismiss petitioner's appeal which had previously been set for argument on April 15, 1959. The motion was heard by the Court of Appeals on April 9, 1959, at which time counsel for the S.E.C. and counsel for the reorganization trustee were allowed to present and complete their argument in support of the S.E.C. motion, whereas petitioner was permitted to begin his argument but not permitted to complete his argument, the Court stating that it had a heavy calendar that day and would rely on the briefs submitted to it, such briefs being presumably petitioner's brief of February 9, 1959, the appellee's brief of March 3, 1959, petitioner's reply brief of March 19, 1959, and petitioner's memorandum in opposition to the S.E.C. motion submitted to the Court of Appeals on April 9, 1959. Prior to the aforesaid S.E.C. motion to dismiss petitioner's appeal no briefs or affidavits were at any time submitted by the S.E.C. to the District Court in opposition to the petitioner's aforementioned mo-

tions, nor had any briefs been filed by the S.E.C. with the Court of Appeals in opposition to petitioner's appeal.

ARGUMENT

In petitioner's reply brief filed with the Court of Appeals on March 19, 1959, petitioner stated that "the paramount issue on this appeal is the integrity of the judicial process." This is also the paramount issue in this petition for certiorari. For what petitioner has maintained in his motions to the District Court and in his briefs to the Court of Appeals is that the reorganization proceedings have been so tainted by a fraudulent course of conduct by the reorganization trustee as to require vacating of the order of the District Court finding strict insolvency of the debtor Third Avenue Transit Corporation, as well as vacating the orders approving, confirming and consummating the reorganization plan. For as this Court has said elsewhere, in requiring that proceedings tainted by the use of perjured or false testimony be reopened, "the untainted administration of justice is one of the most cherished aspects of our institutions and one of our proudest boasts."

In granting the motion by the Securities and Exchange Commission to dismiss petitioner's appeal, the Court of Appeals showed complete unconcern with petitioner's charges of fraud perpetrated upon the court by the reorganization trustee. In brief, such fraud consisted of the following: (1) Continuation of the reorganization proceedings after such proceedings had become moot after regulatory jurisdiction over rates of fare and services of debtor Surface Transportation Corporation of New York was removed from the Public Service Commission of the State of New York to the City of New York; (2) Filing of a fraudulent application for delisting the common stock of debtor Third Avenue Transit Corporation with the Securities and

Exchange Commission by the New York Stock Exchange, and (3) Fraudulent plan of concealment from the stockholders of the entry by the Court of the order of strict insolvency of debtor Third Avenue Transit Corporation.

The Reorganization Proceedings Became Moot Prior to the Entry of the Order Finding Strict Insolvency of Debtor

Under Section 178 of the Bankruptcy Act (11 U. S. C. 578) it is provided that "In case a debtor is a public utility corporation, wholly intrastate, subject to the jurisdiction of a State Commission having regulatory jurisdiction over such debtor, a plan shall not be approved as provided in Section 574 of the Act, unless such State Commission shall have first certified its approval of such plan as to the public interest therein and the fairness thereof."

From the legislative history of the section as well as from the language of the Act itself and by applying the maxim that "that which is properly implied is as much a part of a statute as that which is expressed" it would seem clear that (1) Congress did not give the Federal courts jurisdiction over reorganization plans of all intrastate public utilities; (2) The State Commission must have regulatory jurisdiction over the intrastate public utility whose reorganization plan under Chapter X must be approved by such State Commission, and (3) The State Commission must have such regulatory jurisdiction at the time the reorganization plan for such intrastate public utility is submitted to the Court for certification by such State Commission.

Thus in Senate Report No. 1916 on Revision of the National Bankruptcy Act (75th Congress, 3rd Session, 1938, p. 6) discussing the subject of "Approval by State Com-

missions," the Report says: "The House bill did not include the provisions of Section 77B which requires the approval, by State Commissions possessing regulatory jurisdiction over intrastate public utility corporations, of plans of reorganization for such corporations. This jurisdiction is in effect preserved in Section 224 of the House bill, but your committee considers it desirable to remove any ambiguity with respect thereto by restoring to the bill the language of the present law."

The reference to the "present law" is to Section 77B(e)(2), 11 U. S. C. 207(e), 1934 ed., which provided as follows:

> "In case the debtor is a utility subject to the jurisdiction of a regulatory commission or commissioners or other regulatory authority or authorities, created by the laws of the State or States in which the properties of the debtor are operated, a plan of reorganization shall not be confirmed until (a) it shall be submitted to each such commission or authority having regulatory jurisdiction over the debtor, (b) an opportunity shall be afforded each such commission or authority to suggest amendments or objections to the plan, and (c) the judge shall consider such amendments or objections at a hearing at which each such commission or authority can be heard. In case the debtor is a public utility corporation wholly intrastate in character no court shall approve any plan of reorganization if the regulatory commission of such State having jurisdiction over such public utility certifies that the public interest is affected by said plan, unless said regulatory commission shall first approve of said plan as to the public interest therein and the fairness thereof. If said regulatory commission shall not within thirty days or such additional period as the court may prescribe after the submission of a plan to it file said certificate it shall be deemed that the public interest is not affected by said plan."

On June 15, 1955 the reorganization trustee filed an amended reorganization plan covering debtor Third Avenue Transit Corporation, a holding company wholly intrastate, and its wholly owned subsidiaries, Surface Transportation Corporation of New York, Westchester Street Transportation Company, Inc., The Westchester Electric Railroad Company, the Yonkers Railroad Company, and Warontas Press, Inc. On June 21, 1949 the reorganization proceedings for all these companies were consolidated by order of the Court. The hearing on said amended reorganization plan was scheduled for July 6, 1955 and pursuant to such hearing the Court issued its order on August 5, 1955, finding strict insolvency of the debtor, Third Avenue Transit Corporation.

At the time of the entry of such order the applicable provision of the Public Service Law governing regulatory jurisdiction by the Public Service Commission over debtors herein was as follows:

"Notwithstanding the provisions of this chapter, or any other provision of law, the commission shall have no jurisdiction with respect to rates of fare, transfers, zones, combined rides and the division of the receipts thereof, established pursuant to any contract, franchise, or consent heretofore or hereafter made between any omnibus corporation, street railroad corporation or any corporation or person operating a street surface transportation facility and any city having a population of more than one million inhabitants, or with respect to the service related to such rates of fare. As to such matters the governing body of any such city or any agency of such city to be designated by it shall have and exercise the power and duties which, except for this section, would be had and exercised by the commission."

It is clear from a reading of this section that the Public Service Commission was deprived of jurisdiction with respect to rates of fare, transfers, zones, combined rides and the division of receipts thereof, and service relationship to such rates of fare. Since regulatory agencies have a responsibility to permit regulated intrastate public utilities a reasonable rate of return on the value of the property devoted to public use, and since the Public Service Commission of the State of New York was deprived of such responsibility with respect to omnibus companies in the City of New York, it would be logical to assume that the Congress did not intend to give jurisdiction to the Federal Courts over reorganization plans for such intrastate public utilities which ceased to be subject to the regulatory jurisdiction of a State Commission. Since Surface Transportation Corporation of New York was an intrastate public utility whose operations were completely within the borders of the City of New York and accordingly under the regulatory jurisdiction of the City of New York, and since this company in 1955 contributed about 95% of the gross revenues of the debtors in reorganization, it would be logical to assume that the Federal Court ceased to have jurisdiction over the reorganization of such debtor at the time the State Public Service Commission was deprived of its regulatory jurisdiction over such debtor. With respect to the scope of the concept of "regulatory jurisdiction", petitioner in his brief to the Court of Appeals has pointed out that the term has a definitely ascertainable meaning, and that when applied to a public service commission it means the delegation by statute to such board the authority to fix the rates or compensation for public utilities.

That the reorganization proceedings became moot on March 27, 1950 would appear to be indicated by the decision of the Appellate Division, First Department, New York Supreme Court in the *New York City Omnibus Corp.* case, where the court held as follows:

"While this submission was sub judice, Chapter 163 of the Laws of 1950 was enacted on March 27, 1950, effective as of the same date. It is there provided that the Public Service Commission shall have no jurisdiction with respect to rates of fares established pursuant to any contract or franchise heretofore or hereafter made between any omnibus corporation and a city having more than a million inhabitants. In view of this legislation, the controversy submitted has become moot, and the submission should, accordingly, be dismissed. (Wilmerding v. O'Dwyer, 297 N. Y. 664.)"

Whether the reorganization proceedings with respect to Surface Transportation Corporation of New York became moot on March 27, 1950, or on June 23, 1953, when jurisdiction of the Public Service Corporation with respect to both fares and service of the above-mentioned debtor ceased, certainly on July 6, 1955, when the Court held hearings on the trustee's amended reorganization plan, the District Court did not have the jurisdiction required by Section 178 of the Bankruptcy Act (11 U.S.C. 578) for approval of a reorganization plan involving the above-mentioned debtor. It should be noted that the counsel for the reorganization trustee submitted a brief as *amicus curiae* in the above noted New York Appellate Division case. It should be further noted that the reorganization trustee gave no consideration to the tax windfall that may have accrued to Surface Transportation Corporation of New York with the removal of Public Service Commission regulatory jurisdiction over said debtor, since the provision of the New York Tax law with respect to the state tax on the furnishing of utility services provided:

"Notwithstanding any other provision of this chapter or of any other law, a tax equal to two per centum per annum of its gross income is hereby imposed upon

every utility doing business in this state which is subject to the supervision of the state department of public service. (New York State Tax Law, Sec. 186a.)"

The New York Stock Exchange Filed a Fraudulent Application for Delisting the Common Stock of Debtor With the Securities and Exchange Commission

The Regulations of the Securities and Exchange Commission with respect to the suspension and delisting of securities listed and registered on a national securities exchange are set forth in the Appendix to Appellant's Brief pages 20a to 25a. On April 24, 1957 the New York Stock Exchange filed an application under Rule X-12d2-2 for the delisting of the common stock of debtor Third Avenue Transit Corporation. This application was as follows:

FORM 25

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D. C.

NOTIFICATION OF THE REMOVAL FROM LISTING AND REGISTRATION OF MATURED, REDEEMED OR RETIRED SECURITIES

The New York Stock Exchange hereby notifies the Securities and Exchange Commission of its intention to remove the entire class of the following security from listing and registration on the Exchange at the opening of business on May 4, 1957, pursuant to the provisions of Rule X-1202-2(a).

THIRD AVENUE TRANSIT CORPORATION

Name of Issuer

(now SURFACE TRANSIT, INC.)

Capital Stock without par value

Description of Security

This removal is being effected because the Exchange knows or is reliably informed:

(Indicate the applicable paragraph below and insert appropriate dates and other details)

☐ (1) That the entire class of this security was called for redemption, maturity or retirement on .....; appropriate notice thereof was given; funds sufficient for the payment of all such securities were deposited with an agency authorized to make such payment; and such funds were made available to security holders on.....

☐ (2) That the entire class of this security was redeemed or paid at maturity or retirement on .....

☐ (3) That on..... the instruments representing the securities comprising the entire class of this security came to evidence, by operation of law or otherwise, other securities in substitution therefor and represent no other right except, if such be the fact, the right to receive an immediate cash payment.

☐ (4) That all rights pertaining to the entire class of this security were extinguished on December 17, 1956. (Briefly summarize details below)

Plan of Reorganization of Debtor under Chapter 10 of Bankruptcy Act confirmed by U.S.D.C. for the Southern District of New York on October 8, 1956. On December 17, 1956, pursuant to order of the court, the reorganization trustee transferred the operating assets of the Third Avenue System to the reorganized Corporations. The Capital Stock of the debtor did not participate in the Plan of Reorganization. The Exchange is informed that appeals from orders of the court have been terminated.

The Exchange also notifies the Securities and Exchange Commission that as a result of the above indicated conditions this security was suspended from trading on August 8, 1955.

New York Stock Exchange
Department of Stock List
Name of Exchange

L. J. Hasselbach
By L. J. Hasselbach
Name

Assistant Director
Title

April 12, 1957
Date

The above form states that the common stock of debtor Third Avenue Transit Corporation would be removed on May 4, 1957 from listing and registration by the New York Stock Exchange.

That this application for delisting was fraudulent is indicated by the following facts:

(1) The common stock of debtor Third Avenue Transit Corporation was not a "matured, redeemed or retired" security to which regulation X-12D2-2 applies.

(2) The reorganization trustee, in his application for qualification of indentures under the trust indenture act of 1939, filed with the S.E.C. on November 30, 1956 in answer to the question "Principal Owners of Voting Securities" stated: "By order dated August 5, 1955, the United States District Court for the Southern District of New York found that the company was insolvent and that the shareholders had no interest in the property."

(3) In the Certificate of Amendment of the Certificate of Incorporation of debtor Third Avenue Transit Corporation, filed under the New York Stock Corporation Law on November 19, 1956, the reorganization trustee stated:

> "Par. 3. The certificate of incorporation of the corporation is hereby amended so as to change the name of the corporation, to increase the number of directors, to authorize new shares, to eliminate its presently authorized capital stock from the enumeration and description of shares which the corporation is authorized to issue," and
>
> "Par. 5. The presently authorized 167,509 shares of capital stock of the corporation without par value have been eliminated by the Joint Plan of Reorganization pursuant to Chapter X of the National Bankruptcy Act."

(4) The Certificate of Merger of Surface Transportation Corporation of New York with Third Avenue Transit Corporation, pursuant to Sec. 26 and 85 of the Stock Corporation Law, executed by the reorganization trustee on November 19, 1956, stated:

"Par. 4. Joint Plan of Reorganization dated June 26, 1956 confirmed October 8, 1956, provides among other things that Surface be merged into Third Avenue Transit Corporation and that the trustee in reorganization have full power and authority to take all steps necessary and proper to effectuate said merger; and

"Par. 5. Surface is hereby merged into Third Avenue Transit Corporation and Third Avenue assumes all of the obligations of Surface."

(5) The New York Stock Exchange's own regulations provide that in the case of matured, redeemed or retired securities, the Exchange simultaneously with the suspension of trading in such securities will give notice to the Securities and Exchange Commission of its intention to remove such security from listing and registration. Thus Rule 499(8) of the New York Stock Exchange states:

"An entire class, issue or series is paid, redeemed or retired—whenever the entire outstanding amount of a listed class, issue or series is retired through payment at maturity, or through redemption, reclassification or otherwise, the Exchange, at a time which is appropriate in consideration of the circumstances of the particular case, may suspend dealings in the security and give notice to the Commission on the Commission's Form 25, of intention to remove such security from listing and registration, as required by Rule X-12D2-2 of the Commission." (Commerce Clearing House, New York Stock Exchange Guide, Vol. 2, page 4736.)

It should be noted that the reorganization trustee as a member of a New York Stock Exchange firm was thoroughly conversant with the rules of the New York Stock

Exchange. It should further be noted that the secretary of debtor Third Avenue Transit Corporation had, as an officer of a listed corporation, a copy of the New York Stock Exchange manual spelling out the Exchange's rules as to delisting, and as an employee of counsel for the reorganization trustee such information was readily available to such counsel. For the Securities and Exchange Commission to maintain that the action of the New York Stock Exchange in delisting the common stock of debtor Third Avenue Transit Corporation was in conformity with applicable S.E.C. regulations, and further for the S.E.C. to justify such action by the New York Stock Exchange is beyond petitioner's comprehension.

Fraudulent Concealment From Stockholders of Entry of Order of Strict Insolvency of Debtor Third Avenue Transit Corporation

Petitioner maintains that his brief on appeal to the Court of Appeals and his reply brief show that the District Court erred in dismissing petitioner's motions since the fraud involved was, as alleged, sufficient to have warranted a court of equity in disregarding or setting aside the order of August 5, 1955 finding strict insolvency of debtor.

Petitioner maintains that the fraudulent course of conduct by the reorganization trustee with respect to the insolvency order is indicated by the following:

(1) The District Court issued its order, presumably prepared by counsel for the reorganization trustee, dated June 27, 1955, as follows:

> "Ordered that the said trustee give notice substantially in the form annexed hereto, and marked Exhibit A, of the contents of his amended plan and the continuance

of hearings herein to all the creditors and stockholders of the debtors by mailing copies of such notice to them on or before June 29, 1955, at their addresses as they appear on the books of the debtors or may otherwise be known to said Trustee." The hearing was scheduled for July 6, 1955.

The trustee knew that such notice could not have reasonably been received in time for such hearing by stockholders such as petitioner herein, whose stock was registered in the names of brokers as nominees, nor could such notice have been received by the owners of debentures and first mortgage bonds of debtor, many of such securities also being registered in the names of brokers as nominees.

(2) The assistant secretary of debtor filed an affidavit on June 29, 1955 with the District Court attesting to service of notice on creditors and stockholders as required by the court's order of June 27, 1955. Neither at that time or at any other time was a certified list of the creditors and stockhholders to whom notice was given filed with the Court.

(3) Notice by publication to stockholders and creditors was not claimed by trustee with respect to the aforesaid hearing.

(4) At the hearing on allowances on June 27, 1957, petitioner offered to the S.E.C. letters from other stockholders showing failure to receive notice of the aforesaid hearing, and requested the S.E.C. to examine into the bona fides of the affidavits of notice. The S.E.C. refused.

(5) The trustee did not transmit notice of entry of the bar order to any stockholder or creditor.

(6) At the hearing on allowances on June 26, 1957 petitioner learned for the first time that an attorney for a group of six stockholders (all related or closely connected

with a former director of debtor) had received notice of entry of the order of strict insolvency and had resigned on August 3, 1955, two days before the order of strict insolvency was entered, and that on August 3, 1955, all of the stockholders represented by such attorney had disposed of their stock in debtor. The result was that no stockholder with knowledge of the entry of the order of strict insolvency was in position to appeal the said order.

(7) On August 8, 1955 the New York Stock Exchange suspended trading in Third Avenue Transit Corporation common stock as a result of receiving notice that the District Court had determined in its order dated August 5, 1955 that "the stockholders of said debtor have no interest in the property." Furnishing of such notice to the New York Stock Exchange is no substitute for furnishing such notice to the stockholders directly involved. It should be noted that neither the New York Stock Exchange or the Securities and Exchange Commission made any attempt to bring the order of the District Court to the notice of the stockholders affected.

When Mr. Justice William J. Brennan, Jr. was a member of the New Jersey Supreme Court he made the following comments in a disbarment proceeding which petitioner feels can be applied to the present situation. He then said:

> "There is no profession, save perhaps the ministry, in which the highest morality is more necessary than the law. It has been very aptly said that there is no profession apart from the legal profession where there is greater disparity between true character and reputation. The fault lies in the lack of understanding by the public principally provoked by the transgressors among us—not so much by the flagrant violators because the public is quick to appreciate the inevitableness of their existence, but by those (members of the

bar) who by unconscionable conduct tip the delicate balance in which trust and confidence in a lawyer's actions hangs; not so much by malefactions which are branded criminal but by those that are in the twilight zone of morality."

It is petitioner's contention that the error committed by the District Court was so substantial and contrary to law as manifestly warranted petitioner to have the legal errors reviewed on appeal, and that the dismissal of petitioner's appeal by the Court of Appeals as frivolous was an abuse by a court of equity of its judicial discretion.

CONCLUSION

Wherefore, it is respectfuly submitted, petitioner's application should be granted.

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Dated: April 24, 1959

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BRIEF FOR DOYLE, AS TRUSTEE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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LESTER T. DOYLE, as Trustee in Reorganization, *et al.*,
Respondents.

BRIEF FOR DOYLE, AS TRUSTEE, IN OPPOSITION TO PETITION FOR CERTIORARI (WITH APPENDIX)

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Dated: May 22, 1959.

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Respondents.

BRIEF FOR DOYLE, AS TRUSTEE, IN OPPOSITION

Opinions Below

The opinion of the District Court (Dimock, D.J.) has not been reported, but is to be found at pages A 2 to A 10 of the appendix to this brief. The memorandum decision of the Court of Appeals dismissing the appeal has not been reported, but appears at page A 1 of the appendix hereto.

The opinion of the Court of Appeals on a prior and directly related appeal by petitioner is reported at 238 F. 2d 665 (cert. den., 352 U. S. 1031) and appears at pages A 11 to A 18 of the appendix.

The Question Presented

Whether the Court of Appeals erred in dismissing an appeal which presented (a) a question of fact previously litigated and decided by the District Court adversely to petitioner, and affirmed by the Court of Appeals, and (b) contentions of law utterly lacking in merit and frivolous on their face.

Statement

Proceedings for the reorganization of Third Avenue Transit Corporation and subsidiaries were commenced by the filing of an involuntary petition on October 25, 1948. On June 21, 1949 trustees were appointed. On July 26, 1956 a Plan of Reorganization was approved and the Plan was confirmed on October 8, 1956.

Petitioner, a stockholder of Third Avenue Transit Corporation, first appeared on the scene in July 1956 and made six motions assailing the regularity of the proceedings in a variety of respects. Upon the denial of his motions he appealed to the Court of Appeals, which affirmed the District Judge (*Woolfson* v. *Doyle*, 2 Cir., 238 F. 2d 665) and found upon careful consideration that "there is not a shred of merit in any" of the "miscellany of points" that he raised. This Court denied certiorari (352 U. S. 1031; petition for rehearing denied 353 U. S. 931).

Following the conclusion of these appeals the District Court, on April 10, 1957, ordered that exchange and distribution pursuant to the Plan be effected, and on April 18, 1957 found that the Plan had been substantially consummated.

Petitioner, unmoved by the determination of the Court of Appeals that:

> "The insolvency of the debtor is abundantly established as of the date of the order of adjudication and long prior thereto."

continued to make groundless motions, irresponsibly attacking the reorganization trustee, the Securities and Exchange Commission and the New York Stock Exchange. He continued to burden the courts with contentions which the Court of Appeals had described as "unsubstantial and technical". He did not, however, contend that the debtor had become solvent, so as to entitle stockholders to participate in a plan of reorganization.

Trustee's Contentions

In earlier litigation petitioner charged the reorganization trustee with failure to mail a notice of continued hearings on plans of reorganization to stockholders and creditors as required by an order of the District Court. He offered no evidence in support of these charges and they were rejected by the District Court. The District Court was affirmed on appeal, and certiorari was denied by this Court.

Petitioner renewed these charges in this proceeding and again offered no substantial evidence in any way supporting them. They were again rejected by the District Court, and the Court of Appeals quite properly dismissed petitioner's appeal as frivolous (*post*, pp. 4-6).

In addition to these wholly unsupported and false charges of wrongdoing petitioner advances two contentions of law which are frivolous on their face.

First he asserts that a 1950 amendment to the New York Public Service Law removing from the comprehensive regulatory jurisdiction of the Public Service Commission power over rates of fare and service in New York City had the effect of depriving the District Court of jurisdiction to proceed with the reorganization of the debtors. This approaches nonsense (*post*, pp. 6-8).

Petitioner also asserts that because of an alleged irregularily in the delisting of the common stock of debtor Third

Avenue Transit Corporation by the New York Stock Exchange, the reorganization proceedings should be reopened. The gist of this complaint against the Stock Exchange is that the stock was delisted pursuant to the provisions of Securities and Exchange Commission Rule X-12D2-2 rather than Rule X-12D2-1. For this petitioner also asked the District Court to order the Securities and Exchange Commission to commence a criminal proceeding against the Stock Exchange. However, the District Court found that there had been no irregularity in the proceedings of the Stock Exchange. Furthermore, the applicable statute does not authorize the Securities and Exchange Commission to commence criminal proceedings against anyone. In addition, even if the Commission had such power the District Court could not substitute it judgment for that of the Commission in determining whether criminal proceedings should be instituted (*post*, pp. 8-10).

In view of the obvious lack of merit in any of petitioner's contentions the Court of Appeals was entirely correct in dismissing the appeal.

Argument

The Question of Fact

For four years petitioner has been making grave allegations of wrong-doing on the part of the reorganization trustee and the Securities and Exchange Commission. His petition to this Court is replete with unsupported charges of "fraud".

In 1956 he sought to examine the Chairman of the Securities and Exchange Commission, charging that "the Commission has failed to give the Court the impartial and expert administrative assistance * * * required by the Bankruptcy statutes". He sought removal of the reorganization trustee, charging that he had "deliberately concealed from this Court the fact that the debtor has become solvent".

In this earlier litigation he also charged that the reorganization trustee had wilfully failed to comply with an order of the court directing the transmission to creditors and stockholders of a summary of an amended plan and a notice of continued plan hearings. While petitioner was vociferous in these charges, he offered no evidence in support of them. The District Court, accepting the detailed affidavits attesting to the regularity of the mailing, rejected his contentions.

Petitioner persisted and appealed to the Court of Appeals. That court affirmed the finding of the District Court that all required notices had been sent to creditors and stockholders. (*Woolfson* v. *Doyle*, 2 Cir., 238 F. 2d 665; A 15-A 17). Petitioner, unmoved, then sought certiorari and in his petition presented the question:

> "2. Whether the failure of the trustee of debtor to transmit to stockholders and creditors notice of a hearing * * * is not violative of due process." (Pet. p. 2)

His petition was denied by this Court (352 U. S. 1031), as was his petition for a rehearing (353 U. S. 931).

Undeterred by the outcome of this litigation, petitioner renewed his charges of wrong-doing in a series of more recent motions seeking, among other things, to reopen the reorganization proceedings on account of this alleged fraudulent failure to notify the stockholders of the proceedings.

Judge Dimock carefully considered the renewed charges and correctly concluded:

> "All of these charges were heard and rejected in a previous motion made by Woolfson and their rejection was affirmed by the Court of Appeals in In re Third Avenue Transit Corporation, 238 F. 2d 665, cert. denied 352 U. S. 1031." (A 3)

The only evidence offered by petitioner in this proceeding was an affidavit containing what purported to be copies

of letters stating that certain stockholders had not received a notice. As to this matter the District Judge said:

> "An answering affidavit states that the notices were mailed to the proper addresses and not returned undelivered by the Post Office. I accept the truth of the answering statement. The direction of the court was that the notices be mailed and they were properly mailed so that, even if some of them were not received, that would not constitute a defect in the proceedings." (A 3)

No amount of repetition of unfounded charges is a substitute for proof. The conclusion of the District Court was clearly correct on the evidence, and in the light of the lengthy prior litigation no substantial question was presented to the Court of Appeals. Hence that court was obviously right in dismissing the matter on grounds of frivolity.

Frivolous Contentions of Law

(1) Alleged lack of jurisdiction in the District Court.

Petitioner also charges that the reorganization trustee fraudulently participated in the "Continuation of the reorganization proceedings after such proceedings had become moot after regulatory jurisdiction over rates of fare and services of debtor Surface Transportation Corporation of New York was removed from the Public Service Commission of the State of New York to the City of New York;" (Pet. p. 5). Petitioner is wrong and his argument farcical.

On his prior appeal he argued that the District Court had erred in submitting the plan of reorganization to the Public Service Commission for certification of its approval pursuant to Section 178 of Chapter X (11 U. S. C. § 578) and urged, then as now, that by reason of a 1950 amendment to the Public Service Law (§ 5-d) removing from the comprehensive regulatory jurisdiction of the Commission power over rates of fare and service in New York City, the Com-

mission no longer possessed such "regulatory jurisdiction" over the debtors as to require its approval of the plan. The court did not determine whether the removal of these aspects of regulatory jurisdiction made Section 178 inapplicable, but disposed of the contention saying:

> "[6] Appellant also challenges the District Court's approval of the plan on the ground that the Court need not have submitted the plan to the New York State Public Service Commission under Section 178, 11 U. S. C. A. § 578, since that body lacks jurisdiction to establish rates for the debtor corporation. Even if this were true, we fail to see how appellant could have been injured by such submission." (238 F. 2d 665, 669; A 17).

Judge Dimock, we urge, was clearly right in holding that the Public Service Commission continued to have regulatory jurisdiction within the meaning of Section 178 (A 5-A 6).

However, if one were to assume, contrary to fact, that the amendment to the Public Service Law resulted in the debtor Surface not being "subject to the jurisdiction of a State commission having regulatory jurisdiction", the District Court, at most, required that an unnecessary step be taken. And, as the Court of Appeals observed, petitioner was in no way injured.

Petitioner's argument that upon the amendment of the Public Service Law the proceedings "had become moot". (Pet. pp. 6-11) is based upon his complete misapprehension of the place of Section 178 in the statutory scheme of Chapter X.

Section 178 in no way makes regulatory jurisdiction of a State commission a condition precedent for the exercise of the court's reorganization jurisdiction.

The provision is that "*in case** a debtor is a public utility corporation" "subject to the jurisdiction of a State commission * * * a plan shall not be approved * * *" unless such State commission shall have certified its approval or

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* Italics are ours throughout.

failed to make any certification within the period prescribed. Section 178 patently does not deprive the District Court of jurisdiction *in other cases i.e.*—where the debtor is not a public utility corporation meeting the specifications set forth therein.

The amenability of corporations to reorganization under Chapter X is determined by Section 106, subdivisions (5) and (3); (11 U. S. C. § 506, subdivs. (5), (3)) which make any corporation which could be adjudged a bankrupt, and any railroad corporation, excepting a railroad corporation authorized to file a petition under Section 77 (11 U. S. C. § 205), subject to Chapter X proceedings.

It is obvious that Section 178 merely provides an additional step to be taken in the proceeding when the prescribed conditions exist. It has no bearing whatever on the jurisdiction of the District Court over debtors not within its terms. Petitioner's contentions to the contrary are patently frivolous.

(2) Charges against the New York Stock Exchange.

Petitioner charges that "The New York Stock Exchange filed a fraudulent application for delisting the common stock of debtor with the Securities and Exchange Commission", (Pet. p. 11) and he poses the further question:

> "3. Whether a court of equity can deprive petitioner of a hearing on the obligation and duty of the Securities and Exchange Commission to institute criminal proceedings against the New York Stock Exchange for wilful violation of S. E. C. regulations." (Pet. p. 3)

The gist of petitioner's grievance against the Stock Exchange is that the old common stock of debtor Third Avenue Transit Corporation was delisted pursuant to the provisions of Securities and Exchange Commission Rule X-12D2-2 rather than Rule X-12D2-1, which he deems applicable. There is no occasion to lengthen this brief with much comment as to this contention. It is clearly erroneous.

The District Judge in his well considered opinion fully demonstrates that there was not a scintilla of irregularity in any action of the Stock Exchange (A 7 to A 10).

Furthermore, assuming contrary to fact, that there had been some irregularity on the part of the Stock Exchange, petitioner's remedy would have been a direct proceeding against the Exchange and not an application to reopen the reorganization proceedings.

Petitioner also sought an order directing the Securities and Exchange Commission to commence criminal proceedings against the Stock Exchange. The patient District Judge denied this motion contemporaneously with his determination of petitioner's other motions. He concluded that "the actions of the Stock Exchange were in accordance with its rules and the rules of the Securities and Exchange Commission." (A 10). Hence there was no occasion for any proceedings, criminal or otherwise, to be brought against the Stock Exchange.

There is no provision in the Securities Exchange Act of 1934 authorizing the Securities and Exchange Commission "to institute criminal proceedings" against anyone. The statute is precisely to the contrary.*

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* Sec. 21. (e) (15 U. S. C. § 78 (u)).

"Whenever it shall appear to *the Commission* that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it *may in its discretion bring an action in the proper district court of the United States*, the United States District Court for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, *to enjoin* such *acts or practices*, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. *The Commission may transmit* such *evidence* as may be available concerning such acts or practices *to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.*"

Moreover, even if one were to assume, in contradiction of the facts, that there had been some irregularity on the part of the Stock Exchange and further, in contradiction of plain law, that the Securities and Exchange Commission had authority to institute a criminal proceeding, it is clear that there was no jurisdiction in the District Court, upon the motion of a private party, to compel the Commission to take such action. *Leighton* v. *S. E. C.*, D. C. Cir., 221 F. 2d 91 (1955); *Crooker* v. *S. E. C.*, 1 Cir., 161 F. 2d 944 (1947).

Conclusion

Petitioner's contentions are patently frivolous. The dismissal by the Court of Appeals was entirely appropriate. The petition should be denied.

Dated, New York, N. Y.
May 22, 1959.

Respectfully submitted,

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